

CHAPTER 10:



OPERATIONAL FUNDING

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CHAPTER 10

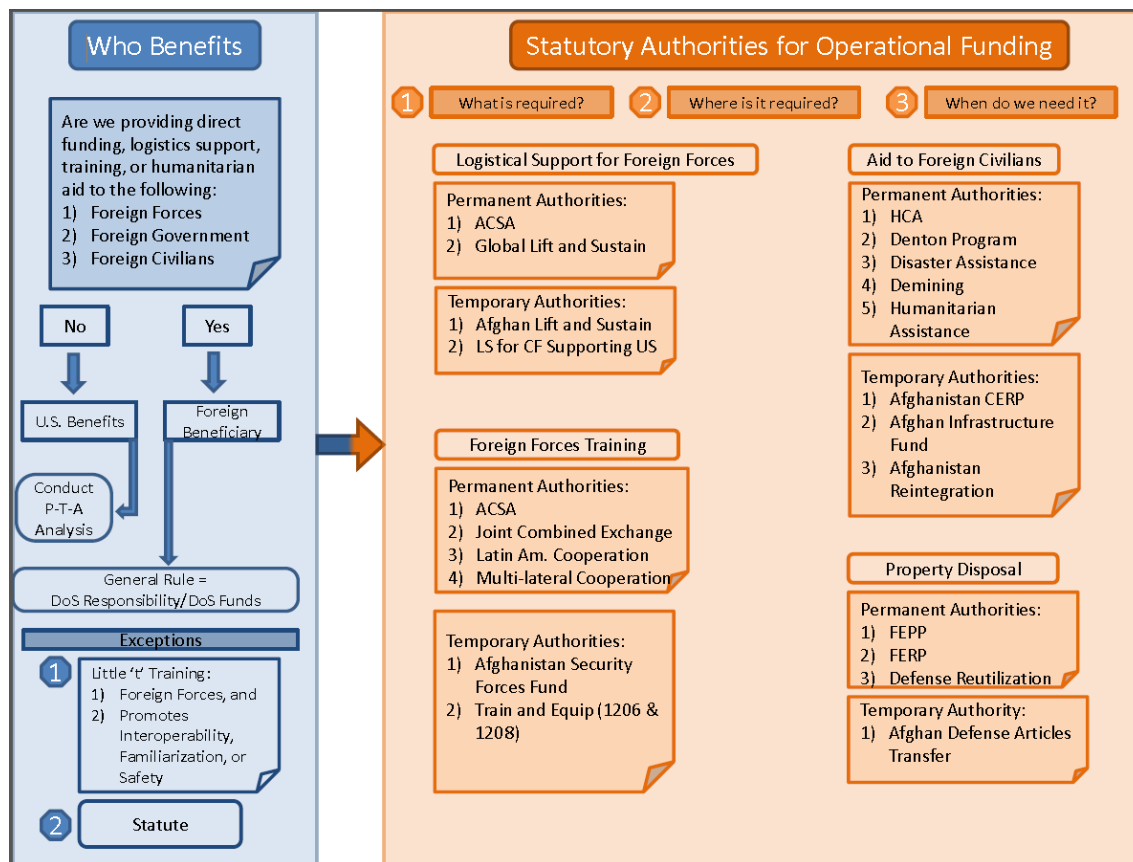
OPERATIONAL FUNDING

I. OBJECTIVES

- A. Appreciate the roles and responsibilities of the Department of Defense (DoD) and the Department of State (DoS) in funding military foreign assistance.
- B. Develop tools to analyze and compare the “purpose” of proposed military foreign assistance operations with the “purpose” of particular appropriations and authorizations.
- C. Achieve general familiarity with past and current appropriations and authorizations for military foreign assistance operations.

II. INTRODUCTION AND ANALYTICAL FRAMEWORK

- A. “Military Operation”
 - 1. Joint Publication (JP) 1-02 defines a military operation as follows: a series of tactical actions with a common purpose or unifying theme; a military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission.
 - 2. JP 3-0, *Joint Operations*, identifies the realm of military operations including, but not limited to, major operations, homeland defense, civil support, show of force, enforcement of sanctions, peace operations, counterinsurgency operations, combating terrorism, foreign humanitarian assistance, and routine/recurring military activities (*see* Figure V-2).
 - 3. Joint Publication (JP) 1-02 defines combined, as in combined operations, as between two or more forces or agencies of two or more allies.
- B. Framework for Analysis: Who Benefits?



1. Most fiscal issues concerning the funding of “operations” will follow the traditional Purpose-Time-Amount analysis. Primarily this is an in-depth analysis of the “purpose” prong with special emphasis on contingency operations and funding foreign militaries, foreign governments, and other entities not traditionally funded by the military departments’ Operation and Maintenance (O&M) funds.
2. Judge Advocates may find the tools located at Appendices A and B to be helpful when analyzing recommended projects and missions for their commanders in an operational environment. ***While both are intended to provide assistance to the practitioner, neither is a substitute for careful research based on unique facts for each situation.***

III. THE CONSTITUTIONAL AUTHORITY TO FUND UNITED STATES MILITARY OPERATIONS.

A. The President's Commander-in-Chief Powers

Under the U.S. Constitution, the President has the power to conduct foreign affairs, to exercise the Commander in Chief authority, to enter into treaties with other nations, and to receive foreign ambassadors to the United States.

1. U.S. Const. Art II, § 2, cl. 1: "The President shall be the Commander in Chief of the Army and Navy of the United States"
2. U.S. Const. Art II, § 2, cl. 2: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"

B. The Congressional Power of the Purse

Congress can indirectly affect the conduct of foreign affairs by restricting or expanding the appropriated funds available for foreign affairs activities conducted by the executive agencies, including the DoD.

1. *U.S. Const. Art I, § 9, cl. 7*: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law"
2. *U.S. Const. Art IV, § 3, cl. 2*: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"
3. *United States v. MacCollom*, 426 U.S. 317, 321 (1976). "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

C. Beyond the Constitutional Framework.

While the Constitution provides the underlying foundation for understanding congressional authority to issue appropriations, Congress further relies upon a robust legislative framework for regulating how those appropriations are expended. In the field of foreign assistance, fully understanding the fiscal legislative framework is critical to determining how to properly fund certain military operations.

IV. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING

A. Fiscal Legislative Controls

For military commanders, there is NO deployment exception to the fiscal law framework! The same congressionally imposed fiscal limitations regulating the obligation and expenditure of funds for U.S. military forces still applies to funding training and operating with foreign military forces (See Deskbook chapters 2-4). However, Congress requires military commanders to only expend funding for foreign assistance when there is express authority to do so – even during contingency operations.

1. 31 U.S.C. § 1301(a): “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” However, appropriation and/or authorization acts may specifically authorize the secretary to transfer amounts appropriated to other programs, generally with intense congressional oversight.
2. Necessary Expense Doctrine (Three-Part Purpose Test).¹
 - a. “[T]he expenditure must be reasonably related to the purposes for which the appropriation was made.” (commonly referred to as “necessary and incident”).
 - b. “[T]he expenditure must not be prohibited by law.”
 - c. “[T]he expenditure must not fall specifically within the scope of some other category of appropriations.” (note that this applies even where a more appropriate funding source is exhausted and unavailable).

B. Appropriations vs. Authorizations

An appropriation is the statutory authority to incur obligations and make payments out of the U.S. Treasury for specified purposes. The appropriation draws the “pot of money” from the U.S. Treasury with a basic purpose attached to

¹ See *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984). In response to a request for an opinion by Congressman Bill Alexander, the General Accountability Office (GAO) Comptroller General reviewed the use of DoD O&M funds to fully fund the foreign assistance activities of DoD during combined joint military exercises with Honduras.

it, while an authorization may provide additional purposes for which that “pot of money” may be used.

1. Congress provides an annual National Defense Authorization Act (NDAA) as a vehicle to provide additional authorizations for the funds that are appropriated in the yearly DoD Appropriations Act (DoDAA). Many of these additional authorizations exceed the basic purpose of the appropriation to which they were linked.²
2. Traditionally, Congress appropriates funds and authorizes additional purposes for those funds in three annual public laws:
 - a. National Defense Authorization Act (NDAA): provides the maximum amounts that may be appropriated to the DoD and additional purposes for which the funds drawn by the appropriations act may be used.
 - b. Department of Defense Appropriations Act (DoDAA): Appropriates funds for annual DoD military activities. These activities are often referred to as “baseline operations.” For FY 2012, DoD funding was enacted as part of a government-wide, consolidated appropriations act.
 - c. Military Construction Appropriation Act (MILCONAA): Appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD.
3. The current DoD authorization and appropriation acts are as follows (as of February 2013):
 - a. 2014 Consolidated Appropriations Act (CAA) [Division C – DoDAA]: Provides an appropriation which permits individuals with requisite authority to draw against the U.S. Treasury for legal expenditures. Enacted by the President on 17 January 2014.
 - b. 2014 NDAA: Authorizes appropriations for FY 2014 DoD military activities. Enacted by the President on 26 December 2014.

C. “Permanent” vs. “Temporary” Authorizations

² For example, the FY 2013 NDAA, Sec. 1221, Commander’s Emergency Response Program (CERP) for Afghanistan authorizes military commanders to use available DoD O&M funding, up to \$200,000,000, for small scale projects, urgent humanitarian or urgent reconstruction needs that will benefit the Afghanistan civilian population.

1. Permanent appropriations and authorizations are incorporated into U.S. statutory code (e.g., Title 10 for DoD authorities). These are presumed to be permanent until Congress modifies or eliminates the authorization in a later statute.
2. Unlike permanent funding authorities, temporary authorizations are not incorporated into the U.S. Code. Their period of availability is complete unless, or until Congress subsequently re-authorizes the specific funding authority.

V. DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS

A. The Military's Role in Funding Foreign Assistance

1. General Rule. The DoS has the executive responsibility, legal authority, and congressional funding to conduct Foreign Assistance on the U.S. Government's behalf. Foreign Assistance includes Security Assistance to a foreign military or government, Development Assistance for the physical and governmental infrastructure projects benefiting a foreign nation, and Humanitarian Assistance benefiting a foreign population.³
2. The DoD has the executive responsibility, legal authority and congressional funding to secure and defend U.S. interests at home and abroad with military forces. Absent express congressional authority, the Secretary of Defense (SECDEF) may only obligate defense funding when it benefits U.S. military forces. In limited circumstances, DoD may conduct foreign assistance under the following two exceptions: (1) Little "t" training and (2) specific appropriation or authorization from Congress for the DoD to conduct foreign assistance.
 - a. "Little t" training: conducting training or instruction for foreign forces for the primary purpose of promoting interoperability, safety, and/or familiarization with U.S. military forces (i.e., interoperability training). "Little t" training provides an overall

³ The Foreign Assistance Act of 1961 created the authority for the executive branch to conduct foreign assistance on behalf of the United States. *See* Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012); *see also* Exec. Order No. 10973, 26 C.F.R. 639 (1961) which delegated the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State.

benefit to U.S. military forces and may therefore be conducted using O&M appropriations.⁴

b. “Big T” training: foreign military security assistance is primarily undertaken to improve a foreign military force’s operational readiness; it must therefore be funded with DoS authorizations and appropriations.

(1) Evaluation factors: cumulative financial costs, training duration; size of foreign military training force; expected foreign military, training proficiency outcome, training location, and primary training beneficiary.

(2) Examples:

(a) “Little t” training: A two day, airborne insertion exercise involving a company sized element of foreign military paratroopers. The training is of short duration, costs are limited, unit size is small, and training will promote interoperability with U.S. military forces. Certain training expenses may be funded with O&M appropriations.

(b) “Big T” Training: Training a battalion’s worth of foreign military forces to become airborne paratroopers during a month-long airborne training program. The training duration and costs are likely significant, doesn’t promote interoperability/safety and the training primarily benefits the foreign paratroopers. Training expenses will have to be funded using DoS security assistance appropriations, unless DoD has express congressional authority to conduct this training.

c. Statutory Appropriation or Authorization. Express congressional authority for DoD to conduct foreign assistance training and operations under codified statutory authority or a temporary, annual authorization/appropriation.

B. Framework for Defense Authorizations and Appropriations.

⁴ The Honorable Bill Alexander, *supra* note 1. “[M]inor amounts of interoperability and safety instruction [do] not constitute “training” as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations.”

In order to determine whether or not a military commander has authority to conduct foreign assistance operations, JAs should first assess the operation's nature and type for funding purposes. Since Congress does not provide authorities and authorization in specified categories, it may be helpful to consider funding authorities in three general categories: 1. Building and Funding Foreign Partners, 2. DoD Aid and Assistance to Foreign Civilians, 3. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO). Within these three general categories, JAs will find both permanent and temporary authorities to fund foreign assistance operations. Judge Advocates should be engaged early in the operational planning process to identify how to properly fund these various mission types.

C. Building and Funding Foreign Partners.

Within this functional category, there are two general subgroups of funds. The first group funds joint exercises and training, while the second provides logistical support to foreign forces. When foreign forces are our partners in contingency operations, Congress may provide temporary authorities that can fund both training and logistical support. The commander's legal counsel assists with determining the proper authority and funding source for providing security assistance to foreign military forces.

1. Emergency & Extraordinary Expenses ("Triple E" or "15"): 10 U.S.C. § 127.

- a. Purpose: "for any emergency or extraordinary expense which cannot be anticipated or classified."

Time: 1 year O&M funds

- b. Amount: the 2014 CAA appropriates the following

- (1) Secretary of Defense: \$36,000,000 in DoD O&M
- (2) Secretary of the Army: \$12,478,000 in DA O&M
- (3) Secretary of the Navy: \$15,055,000 in Navy O&M
- (4) Secretary of the Air Force: \$7,699,000 in AF O&M

- c. Approval Authority: Secretary of Defense, Secretaries of the military departments, and Inspector General. Authority may be delegated (and re-delegated).
- d. Congressional Notification: Secretary of Defense must provide 15 days advance notice before expending or obligating funds in excess of \$1,000,000, and 5 days advance notice before expending or obligating between \$500,000 and \$1,000,000.
- e. Practitioner Notes:
 - (1) Common Use: .0012 Official Representation Funds (ORF) pursuant to DoDI 7250.13 and AR 37-47. These funds are for official courtesies and other representation.
 - (2) Generally, aside from ORF, these funds are not likely to be tapped other than as a last resort for funding a unique emerging requirement.
 - (3) Though highly regulated, from a legislative perspective, “Triple E” or EEE funds are exceptionally flexible. From a purpose perspective they are often available for any mission; however, from a practical perspective, they are unlikely to be tapped due to regulatory controls.

2. Combatant Commander Initiative Funds (CCIF): 10 U.S.C. § 166a.

- a. Purpose: Enables the Chairman of the Joint Chiefs of Staff to act quickly to support the Combatant Commanders when they lack the flexibility and resources to solve emergent challenges and unforeseen contingency requirements critical to joint war fighting readiness and national security interests.
 - (1) Limited by statute to (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises (including activities of participating countries), (6) humanitarian and civic assistance (including urgent and unanticipated humanitarian relief and reconstruction assistance), (7) military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses), (8) personnel expenses of defense personnel for bilateral or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities.

(2) CJCS priority consideration for:

- (a) Activities that enhance war fighting capability, readiness, and sustainability of the forces assigned to requestor
- (b) Activities not within the AOR of a commander that would reduce threat to or increase national security of the U.S.
- (c) Urgent and unanticipated humanitarian relief and reconstruction- particularly where engaged in contingency operation.

b. Time: 1 year O&M funds

c. Amount: 2014 CAA (H.R. 2055) not to exceed \$25,000,000 of DoD O&M.

d. Limitations:

- (1) No more than \$20,000,000 may be used to buy end items with a cost greater than the expense/investment threshold of \$250,000.
- (2) No more than \$10,000,000 may be used to pay the expenses of foreign countries participating in joint exercises.
- (3) No more than \$5,000,000 may be used to provide military education and training to military and related civilian personnel of foreign countries.
- (4) No funds may be used for any activity which Congress has denied authorization.

e. Approval Authority: Initiatives nominated by Combatant Commanders with final approval authority of CJCS.⁵

f. Practitioner Notes:

⁵ CJCSA 7401.01E (1 July 2009): Combatant Commander Initiative Fund. NOTE: this is a limited release instruction and not for public release.

- (1) Funding: Funds are controlled by CJCS, and projects are competitively selected from amongst the COCOMs.
 - (2) Common Use: Unforeseen or emergent contingency operation requirements.
3. Subgroup One: Funding Joint and Combined Exercises and Training.
 - a. Joint Combined Exchange Training (JCET): 10 U.S.C. § 2011
 - (1) Purpose: Primary purpose is to pay the training expenses for SOF forces assigned to a combatant command. (SOF includes civil affairs and psychological operations forces).
 - (2) Time/Amount: 1 year, Defense Wide, O&M funds; as authorized by Congress.
 - (3) Practitioner's Notes: Where available, the SOCOM Commander or commander of any other specified or unified combatant command may pay any of the following expenses:
 - (a) Expenses of SOF assigned to that command in conjunction with training, and training with, the armed forces and other security forces of a friendly foreign country.
 - (b) Expenses of deploying SOF for training.
 - (c) In the case of training in conjunction with a friendly developing country, the incremental expenses incurred by that country as the direct result of such training.
 - (d) Includes reasonable and proper cost of goods/services consumed by a developing country as a result of direct participation, such as rations, fuel, training ammunition, and transportation.
 - (e) Does not include pay, allowances, and other normal costs of the country's personnel.

b. General Purpose Forces Training Friendly Foreign Militaries: § 1203 of the 2014 NDAA

(1) Purpose: authorizes forces not under the Special Operations Command to conduct training with friendly foreign forces for the purpose of improving the ability of U.S. forces to train foreign militaries during contingency operations.

(2) Time/Amount: 1 year; incremental expenses incurred by the friendly foreign country as the direct result of the training may not exceed \$10,000,000.

(3) Limitations: Any training conducted by U.S. forces under this authority shall, to the maximum extent practicable –

(a) must support the mission essential tasks for which the training unit providing the training is responsible;

(b) be with a foreign unit or organization with equipment that is functionally similar to such training unit; and

(c) include elements that promote both the observance/respect for human rights and respect for the legitimate civilian authority within the foreign country.

(4) Approval Authority: Approval by SECDEF with concurrence of SECSTATE.

(5) Practitioner Notes: This authority was newly created in the 2014 NDAA and still will likely see some regulatory guidance for implementation at the DoD and Service level. In addition to the limitations on incremental expenses, Congress has also included the following notice and reporting requirements for this authority:

(a) 15 day notice to the House and Senate Armed Service Committees prior to commencing any training.

(b) No later than 1 April of each year following the fiscal year in which this type of training is conducted, SECDEF must submit a report to Congress on the training conducted.

c. Latin American Cooperation (LATAM COOP): 10 U.S.C. § 1050.

- (1) Purpose: to fund the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses considered necessary for Latin American cooperation.
- (2) Time/Amount: 1 year O&M funds; limited by the services' individual implementing guidance.⁶
- (3) Approval Authority: SECDEF or Service Secretaries.

d. African Cooperation: Payment of Personnel Expenses: 10 U.S.C. § 1050a.

- (1) Purpose: to fund the travel, subsistence, and special compensation of officers and students of African countries and other expenses considered necessary for African cooperation.
- (2) Time/Amount: 1 Year O&M funds
- (3) Approval Authority: SECDEF or Service Secretaries.

e. Multilateral, Bilateral or Regional Cooperation Programs: 10 U.S.C. § 1051.

- (1) Purpose: to fund the travel, subsistence, and similar personal expenses, of defense personnel from developing countries in connection with the attendance of such personnel at a multilateral, bilateral, or regional conference, seminar, or similar meeting if the SECDEF determines attendance is in the U.S. national security interests.
- (2) Approval Authority: SECDEF
- (3) Practitioner's Notes:
 - (a) Authorized expenses may be paid on behalf of developing country personnel only in connection with travel to, from, and within the unified combatant commander's AOR in which the

⁶ For the Army, the Deputy Chief of Staff, G 3/5/7, has responsibility for implementing this program. *See* AR 11-31 (21 March 2013).

multilateral, bilateral, or regional conference, seminar, or similar meeting for which expenses are authorized is located in or in connection with travel to Canada or Mexico.

- (b) In a case where travel is to a unified combatant command HQs located in the U.S., authorized expenses may be paid in connection with travel of personnel to the U.S. to attend a multilateral, bilateral, or regional conference, seminar or similar meeting.
- (c) In the case of personnel from a developing country that is not a NATO member and that is participating in the NATO Partnership for Peace (PFP) program, expenses may be paid in connection with the travel of personnel to the territory of any PFP participating countries or territory of any NATO member country.
- (d) Expenses paid may not exceed that which would be paid to a member of the U.S. Armed Forces of comparable grade for similar authorized travel.
- (e) This authority is in addition to LATAM COOP.
- (f) Funds available to carry out this section shall be available, to the extent provided in an appropriations act, for programs and activities that begin in one fiscal year and subsequently end in the next fiscal year.

f. Regional Centers for Security Studies (RSC): 10 U.S.C. § 184(f)(3) (DoD Directive 5200.41)

- (1) Purpose: authorizes SECDEF to waive costs of RSC activities for foreign military officers and foreign defense and security civilian government officials if the Secretary determines that attendance of such personnel without reimbursement is in U.S. national security interests.
- (2) Funds available for the payment of personal expenses under the LATAM COOP are also available for the operation of the Center for Hemispheric Defense Studies.

(3) Time/Amount: Waived costs are paid from appropriations available to the RSCs and funds made available, to the extent provided in an appropriations act, for programs that begin in one fiscal year and are completed in the subsequent fiscal year.

(4) Approval Authority: SECDEF

g. Military-to-Military Contact Program: 10 U.S.C. § 168

(1) Purpose: to conduct military-to-military contacts and comparable activities designed to encourage a democratic orientation of defense establishments and military forces of other countries. Specific authorized activities and expenses are delineated in 10 U.S.C § 168.

(2) Time/Amount: The statute specifically requires Congress to appropriate funds in order to undertake activities for this authority. No funds have thus far been appropriated for activities.

(3) Practitioner's Notes: this is a good example that authority by statute does not automatically allow DoD to fund activities. There must be authority and appropriation.

h. Bilateral & Multilateral Exercise Programs (Developing Countries Combined Exercise Program (DCCEP): 10 U.S.C § 2010 (CJCSM 3500.03C, 15 AUG 2012, Appendix D))

(1) Purpose: authorizes the payment of incremental expenses incurred by a developing country as a direct result of participation in a bilateral or multilateral military exercise

(2) Time/Amount: funds are available for exercises that begin in a fiscal year and end in the following fiscal year

(3) Limitations:

(a) Exercise must be undertaken primarily to enhance U.S. security interests; and

(b) Secretary of Defense must determine that participation of the country is necessary to achieve

the (a) fundamental objectives of the exercise and
(b) those objectives cannot be achieved unless the
U.S. pays the incremental expenses

- (4) Approval Authority: SECDEF after consultation with SECSTATE.
- (5) Practitioner's Notes: "incremental expenses" are reasonable and proper costs of goods and services consumed as a direct result of participation in the exercise to include rations, fuel, training, ammunition, and transportation. Pay, allowances, and other normal costs are not included.

4. Subgroup Two: Providing logistical support to foreign forces.

a. Acquisition & Cross-Servicing Agreements (ACSA): 10 U.S.C. §§ 2341–2350⁷ (DoDD 2010.9 and CJCSI 2120.01).

- (1) Purpose: bilateral agreements for the reimbursable mutual exchange of Logistical Supplies, Services, and Support (LSSS) excluding Significant Military Equipment (SME).⁸ Commanders must still use proper appropriated funds for acquiring LSSS from foreign forces.

(a) Two authorities/methods exist:

- (i) Acquisition Only Authority (AoAs) (10 U.S.C. § 2341): Limited authority for SECDEF to acquire LSSS for deployed forces from eligible countries and organizations.⁹

⁷ See DoDD 2010.9 (28 April 2003): Acquisition and Cross-Servicing Agreements; Implemented by CJCSI 2120.01 (13 February 2013): Acquisition and Cross-Servicing Agreements.

⁸ See 10 U.S.C. § 2350, Authorized logistical support includes: food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Logistical support also includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List promulgated under the Arms Export Control Act.

⁹ Eligible countries and organizations include: (a) NATO countries, (b) NATO subsidiaries, (c) UN or any other international organization of which the U.S. is a member, (d) any non-NATO member if it has a defense alliance with the U.S, permits stationing of U.S. Forces, allows preposition of U.S. materiel in their country, or serves as host for U.S. military exercises and operations in the country. The Joint Staff J-4 maintains a list of current ACSAs, as

(ii) Cross-Servicing Agreement (10 U.S.C. § 2342): Permits SECDEF, after consultation with SECSTATE, to both purchase LSSS as well as provide LSSS on a reimbursable basis with eligible countries.

(2) Time:

- (a) Funds may not be obligated for acquisitions beyond or before the period of availability. ACSA orders may not be placed in one fiscal year for a future fiscal year unless a “subject to availability of funds” clause is inserted.
- (b) ACSA reimbursement must be by three methods and within the following time periods¹⁰:
 - (i) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.
 - (ii) Example: DoD provides \$10,000 in tents to a foreign defense department and receives \$10,000 in currency.
- (c) Payment-in-Kind (PIK): Reimbursement must occur within 90 days of initial provision of LSSS.¹¹
 - (i) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.
 - (ii) Example: DoD provides \$10,000 in tents to a foreign defense department and receives \$10,000 in currency.
- (d) Replacement-in-Kind (RIK): Reimbursement must occur within 1 year of initial provision of LSSS.¹²
 - (i) Defined: the receiving defense department reimburses the providing defense department by providing the same type of LSSS.

well as frequently asked questions and training tools. You may find info at:

https://www.intelink.gov/wiki/Acquisition_and_cross-servicing_Agreements_%28ACSA%29.

¹⁰ ACSA authority is the only congressional authorization for DoD to receive direct reimbursement from foreign nations for the costs of DoD-provided support in combined exercises and operations.

¹¹ DoD FMR, Volume 11A, Chapter 8, para. 080202A.

¹² *Id.* at para. 080202B.

- (ii) Example: DoD provides tents to a foreign defense department and receives the exact same type of tents.
- (e) Equal Value Exchange (EVE): Reimbursement must occur within 1 year of initial provision of LSSS.¹³
 - (i) Defined: the receiving defense department reimburses the providing defense department by providing LSSS with the same value as the LSSS initially provided.
 - (ii) Example: DoD provides \$10,000 in tents and is reimbursed by the foreign defense department with \$10,000 of fuel.
- (3) Amount: during any fiscal year, DoD is limited to the following amounts in obligations and reimbursable (applies to PIK transactions only, not exchange transactions)
 - (a) Acquisitions from NATO countries, etc. may not exceed \$200,000,000 (with no more than \$50,000,000 for supplies other than petroleum, oil, and lubricants (POL)).
 - (b) Acquisitions from non-NATO countries may not exceed \$60,000,000 (with no more than \$20,000,000 for supplies other than POL).
 - (c) Transfers to NATO countries, etc. may not exceed \$150,000,000.
 - (d) Transfers to non-NATO countries may not exceed \$75,000,000.
 - (e) Waiver: the above limitations are not applicable during contingency operations or non-combat operations (including humanitarian or foreign disaster assistance and UN peacekeeping missions) for the purposes of that operation.

¹³ *Id.*

(4) Approval Authorities:

- (a) Authority to Enter/Revise Agreements: SECDEF (after consultation with SECSTATE for non-NATO members). Authority may also be delegated CJCS.¹⁴
- (b) Transaction Approval Authority: Personnel are designated specifically based on knowledge and experience to carry out transactions.

(5) Practitioner's Notes:

- (a) ACSA's may not be used to procure goods or services that are reasonably available from U.S. commercial sources.
- (b) Size and scope of support under ACSA should be considered in relation to that nation's capability to reimburse the U.S. for the LSSS. Developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS provided there are available U.S. appropriations or authorizations to otherwise fund the request.
- (c) Common Use: Providing food, transportation, and lodging.

b. ACSA-Lend Authority: 2014 NDAA §1217 (amending §1202(3), FY 2007 NDAA by extending authority lending authority to 31 DEC 2014).

- (1) Purpose: Temporary Authority exists to lend military equipment, on a non-reimbursable basis to our coalition partners (1) in Afghanistan; (2) when participating in combined UN peacekeeping operations; or (3) in connection with training for either of the first two categories.

¹⁴ DoDD 2010.9 para.5 allows Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) to delegate (with coordination) to the CJCS who may further delegate to lead agents. However, all new/revised agreements must still be referred to USD(AT&L) for review and provision of authority to conclude the agreements.

- (2) Time: This authorization is available until 30 September 2016.
- (3) Approval Authority:
 - (a) SECDEF designates COCOM CDRs as approval authorities.
 - (b) When lending in connection with training, a notice and wait period is required. SECDEF must submit intent to congressional committees and wait 15 days.
- (4) Practitioner Notes:
 - (a) This may NOT be used to lend military equipment to the Afghan military.
 - (b) Requires COCOM determination of “no unfilled requirements” prior to lending.
 - (c) Lend period is for 1 year.
 - (d) Operates as a “reimbursement-in-kind” ACSA transaction, because equipment is returned. By policy, normal wear and tear is acceptable; however, recipient must sign agreement to cover non-routine damage or loss.

c. Global Lift and Sustain: 10 U.S.C. § 127d

- (1) Purpose:
 - (a) To provide LSSS, including air-lift and sea-lift, to partner nation forces worldwide in support of the combined operations world-wide (defined below) with U.S. armed forces.
 - (b) To provide LSSS to allied forces solely for enhancing interoperability of logistics support systems of those military forces participating in combined operations with the U.S. Logistical supplies, support and services may also be provided

to nonmilitary logistics, security, or similar agency of an allied government if such provision would benefit the U.S. Armed Forces.

- (2) Time: 1 year DoD O&M funds.
- (3) Amount: not to exceed \$100,000,000 per fiscal year (if to support interoperability only, may not exceed \$5,000,000 per fiscal year).
- (4) Approval Authority: Secretary of Defense
 - (a) Requires Secretary of State concurrence.
 - (b) Secretary of Defense must determine:
 - (i) Provision of LSSS is essential to the success of the combined operation, and
 - (ii) Partner forces would not be capable of participating without the LSSS support
- (5) Practitioner Notes:
 - (a) NOT for joint training exercises — may only be used for combined operations with U.S. forces during active hostilities, as part of a contingency operation, or noncombat operation (such as humanitarian/foreign disaster assistance, country stabilization operation, or UN peacekeeping operation).
 - (b) Not available for OEF/Afghanistan due to the availability of specific temporary authority—Afghanistan Lift and Sustain.
 - (c) DSCA managed program.

d. Personnel Details: 10 U.S.C. § 712

- (1) Purpose: authorizes the armed forces to assist in military matters in any foreign nation of North/Central/South

America, Republics of Haiti and Santo Domingo, or in any other country during a war or declared national emergency.

(2) Time/Amount: on a reimbursable or non-reimbursable basis. No other limits provided.

(3) Approval Authority: the President.

e. Authority to Support Office of Security Cooperation in Iraq (OSCI): 2014 NDAA § 1214

(1) Purpose: SECDEF may, with SECSTATE concurrence, conduct non-operational training activities supporting the Iraqi Ministry of Defense and Counter Terrorism Service personnel in an institutional environment

(a) To address capability gaps, integrate processes relating to intelligence, air sovereignty, combined arms, logistics and maintenance and to manage and integrate defense related institutions

(2) Time/Amount: 1 year; \$209,000,000

f. Coalition Support Fund (CSF): (2013 NDAA§ 1227; Extension and Modification of Authority for Reimbursement of Certain Coalition Nations for Support Provided to U.S. Military Operations)

(1) Purpose: reimburse key cooperating nations for logistical, military, and other support (including country access) provided to support the U.S. in OEF and OSCI security ops. Reimbursement may be monetary or through “in kind” reimbursement:

(a) Specialized training in connection with operations

(b) Procurement and provision of supplies

(c) Procurement of specialized equipment and loaning of equipment on a non-reimbursable basis

(2) Time: 1 year DoD O&M (Overseas Contingency Operating Budget)

- (3) Amount: Not to exceed \$1,500,000,000.
- (4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior notice to Congress (unless reimbursement is for access based on international agreement); No amounts available for obligation before or after 2014 may be used for Pakistan reimbursements under 2008 NDAA § 1233, until SECDEF makes certain certifications to congress about Pakistan's security cooperation achievements.
- (5) Practitioner Notes:
 - (a) Notably, the CSF includes reimbursements for "access," and also includes a provision for specialized training, or loan of supplies and equipment on a non-reimbursable basis known as the Coalition Readiness Support Program (CRSP). Thus, the CSF authorization contains components of both training and logistic support.
 - (b) Prohibition on reimbursement to Pakistan for support during periods closed to transshipment when the ground lines from Pakistan to Afghanistan were closed to U.S. supply shipments.
 - (c) Funding administered by DSCA.

g. Afghanistan Lift and Sustain: currently at 2014 NDAA §1217

- (1) Purpose: Providing supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Afghanistan. For FY 2013, authority for using these funds to support coalition military operations in Iraq is repealed.
- (2) Time: 1 year, DoD O&M funds. Authority expires on 31 DEC 2014
- (3) Amount: not to exceed \$450,000,000.

- (4) Reporting requirements: SECDEF must provide quarterly reports to the congressional defense committees.
- (5) Practitioner Notes:
 - (a) Limitation: Separate funding authority to support coalition military operations in Afghanistan.
 - (b) Key distinction between coalition support and lift and sustain funds:
 - (i) CSF: used to reimburse countries for costs they incur.
 - (ii) L&S: used by the military departments to fund costs incurred for services provided to support eligible countries.
- h. Building Partner Capacity (BCP) and Equip Authority: currently at 2014 NDAA § 1201 (sometimes referred to as “Train and Equip” funding authority)
 - (1) Purpose: provide equipment, supplies, training, and small-scale military construction activities to:
 - (a) build the capacity of foreign military forces in order for that country to: (1) Conduct counterterrorist operations; or (2) Participate in or support military and stability operations in which the U.S. Armed Forces are a participant.
 - (b) build the capacity of a foreign maritime security forces to conduct counterterrorism operations.
 - (2) Time: 1 year DoD O&M funds
 - (3) Amount: \$100M annually
 - (4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior Congressional notification. (NOTE: this has NOT been delegated).
 - (5) Practitioner Notes:

(a) All programs MUST include elements that promote:

- (i) observance and respect for human rights and fundamental freedoms and
- (ii) respect for legitimate civilian authority within that country
- (iii) available for military forces only, not security forces (though a subsequent amendment authorizes use for maritime security forces).

(b) This temporary authority can also be included in the general category of Counterinsurgency/terrorism and Overseas Contingency Operations.

(c) FY 2013 NDAA added small-scale military construction activities to the scope of permissible funding activities.

(i) not more than \$750K may be obligated or expended for small-scale, authorized military construction activities (per project)

(ii) Not more than \$25M may be obligated or expended for small-scale military construction activities under all authorized programs (cumulative total)

i. Special Operations Forces (SOF) Support: last reported in 2012 NDAA § 1203 (annual authority extension through FY 2015)

- (1) Purpose: provides support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing operations by U.S. SOF combating terrorism
- (2) Time: 1 year DoD O&M funds
- (3) Amount: \$50,000,000 annually
- (4) Approval Authority: SECDEF (may not be delegated)

- (a) requires the concurrence of the relevant Chief of Mission assigned to the country where the forces, groups, or individuals supporting U.S. SOF are located prior to disbursing funds.
- (b) SECDEF must notify congressional defense committees within 48 hours of use.

(5) Practitioner Notes:

- (a) Though temporary funding authority exists through FY 2015, JAs need to review annual NDAA for any possible funding changes.

j. Building Capacity of Certain Counterterrorism (CT) forces in Yemen and East Africa: currently in FY 2013 NDAA § 1203

(1) Purpose:

- (a) Enhance Yemen's Ministry of Interior CT forces to conduct CT ops against al Qaeda in the Arabian Peninsula and its affiliates.
- (b) Enhance Djibouti, Ethiopia, and Kenyan the national military forces and security agencies serving a similar defense function, other CT forces, and border security forces to conduct CT ops against al Qaeda, al Qaeda affiliates, and al Shabaab.
- (c) Enhance the capacity of national military forces participating in the African Union Mission in Somalia to conduct CT ops against al Qaeda, al Qaeda affiliates and al Shabaab.

(2) Time: 1 year O&M funding

- (a) Amounts available for a FY may be used for assistance under that authority that begins in such FY but ends in the next fiscal year.
- (b) Authority under this section may not be exercised after the earlier of

(i) The date on which the Global Security Contingency Fund achieves full operational capability

(ii) 30 September 2014

(3) Amount: not more than \$75M to provide assistance; minor military construction – not more than \$10M.

(4) Authority: SECDEF with SECSTATE concurrence

(a) SECDEF shall submit notice to the appropriate congressional committees NLT 30 days before providing assistance under this funding authority

(5) Practitioner's Notes:

(a) Assistance may include the provision of equipment, supplies, training and minor military construction

(b) Assistance shall be provided in a manner that promotes

(i) Observance of and respect for human rights and fundamental freedoms; and

(ii) Respect for legitimate civilian authority in the country receiving such assistance

(iii) SECDEF may not use this funding authority to provide any type of assistance that is otherwise prohibited by any other law provision

D. DoD Aid and Assistance to Foreign Civilians¹⁵

1. Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561.¹⁶

¹⁵ See The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. general authority for humanitarian assistance for civilian populations.

¹⁶ Defense Security Cooperation Agency (DSCA) manages the OHDACA appropriation. DoD 5105.38-M, Security Assistance Management Manual (SAMM) contains guidance for DoD's civilian assistance programs.

- a. Purpose: The Overseas Humanitarian, Disaster and Civic Aid (OHDACA), <http://www.dsca.mil>, appropriation supports the SECDEF and COCOMs' security cooperation strategies to build indigenous capabilities and cooperative relationships with allies, friends, civil society, and potential partners. The appropriation provides low cost, non-obtrusive and highly effective activities that help partners help themselves, improves access to areas not otherwise available to U.S. Forces, and build collaborative relationships with host nation's civil society.

Time/Amount: Generally 2 year funds. The 2014 CAA provided \$109.5 million to finance the humanitarian assistance and mine action programs as well as foreign disaster relief initiatives

2. Individual Authorizations:

- a. 10 U.S.C. § 401: Humanitarian and Civic Assistance (HCA) ¹⁷

(1) Purpose: provide HCA in Conjunction with Military Operations.

(a) Secretary concerned must determine that HCA activities will promote both U.S security interests and the country where such activities will be carried out, while also utilizing specific U.S. service members' operational readiness skills to conduct the activities.

(b) U.S. Armed Forces personnel participate in HCA activities to create strategic, operational, and/or tactical effects that support a COCOM's objectives in theater security cooperation or designated contingency plans while concurrently reinforcing skills required for the operational readiness of the forces executing the HCA mission. U.S. military occupational specialists shall provide services relevant to their specialty.

(c) HCA activities include providing:

¹⁷ See DoDI 2205.02, Humanitarian and Civic Assistance Activities, 2 December 2008 (establishing DOD policy and assigning responsibility for conducting HCA activities).

- (i) Medical, surgical, dental, veterinary care in rural or underserved areas (includes training of such care);
 - (ii) Construction of rudimentary surface transportation systems;
 - (iii) Well drilling and construction of rudimentary sanitation facilities;
 - (iv) Rudimentary construction and repair of public facilities¹⁸
- (2) Funding: Section 401 requires “specific appropriations to carry out HCA activities. There are three sources of “specific” funding for section 401 projects:
 - (a) The OHDACA appropriation expressly funds section 401.
 - (b) 2014 DoDAA §8011: O&M is appropriated for 401 purposes in two ways.
 - (i) Annual DoD O&M HCA funding request:
 - (ii) Incremental expenses incurred as a direct result of providing HCA (other than minimal cost HCA) to a foreign country shall be paid for with funds specifically appropriated for such purposes (included in Military Department O&M accounts)
 - (a) The 2014 DoDAA states that “funds may also be authorized for costs *incidental to authorized operations and pursuant to authority granted in section 401....*” (emphasis added).

¹⁸ In FY07, DoD sought express language in 10 U.S.C. § 401 to authorize certain types of communications and information technology (IT) assistance. Although Congress did not add the language, the Joint Explanatory note to the FY07 NDAA noted that “restoring basic information and communications capacity is a fundamental element of humanitarian and civic assistance....rudimentary construction and repair of public facilities...includes information and communications technology as necessary to provide basic information and communication services.”

- (b) Funding “incidental” costs of HCA. Both section 401 and its annual appropriation from O&M contain language about funding “costs incidental to authorized operations ... in section 401.”¹⁹ OHDACA or O&M funds may be expended for “incidental costs” associated with conducting HCA activities.
- (c) Unauthorized HCA expenses that cannot be paid from HCA funds include costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; and equipment repair). These costs are covered by funds available for the military op.
- (d) Other unauthorized expenses include salaries of host-nation participants and per diem expenses of U.S. Armed Forces conduct HCA activities.

(3) Approval Authority:

- (a) The Undersecretary of Defense for Policy’s is responsible for reviewing and approving proposed HCA project submissions, in coordination with the Joint Chiefs of Staff Chairman to ensure regulatory compliance. COCOM’s are responsible for ensuring that HCA projects, other than minimal cost HCA, are conducted with SECSTATE’s approval.
- (b) Minimum cost HCA: Combatant commander’s determination whether an expenditure is minimal:

¹⁹ The specific language in 10 USC 401(c)(4) is, “Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated..., except that funds appropriated to the [DoD] for operation and maintenance... may be obligated for humanitarian and civic assistance under this section *only for incidental costs of carrying out such assistance.*” (emphasis added).

(i) For activities within their respective AORs.

(ii) In the exercise of the Commander's reasonable judgment.

(iii) In light of the overall cost of the military operation in which such expenditure is incurred.

(iv) For an activity that is incidental to the military operation.

(c) Minimum Cost HCA examples:

(i) A unit doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purpose of providing mass inoculations to the local populace.

(ii) The opening of an access road through trees and underbrush for several hundred yards, but not the asphaltting of a roadway.

(d) Practitioner's Notes:

(i) Must have SECSTATE approval (though DoDD 2205.02 does not require State's approval for "minimal cost HCA.")

(ii) Limitations: (1) cannot duplicate other forms of U.S. economic assistance; (2) not for military or paramilitary activities; (3) expenses may not include costs of the military operation that would have occurred regardless of the HCA.

(iii) Because HCA may be funded with O&M appropriations, the Defense Security Cooperation Agency (DSCA) does not expend OHDACA funds on authorized HCA activities. However, all HCA projects are reported to DSCA for accountability purposes.

b. 10 U.S.C. § 402: Transportation of Humanitarian Relief Supplies to Foreign Countries (Denton program).

(1) Purpose: transport to any country, without charge,²⁰ supplies furnished by NGO's for humanitarian assistance on a space-available basis.

(2) Practitioner's Notes:

(a) Before transporting supplies, the Secretary of Defense must determine:

(i) The transport of the supplies is consistent with U.S. foreign policy;

(ii) The supplies are suitable for humanitarian purposes and in usable condition;

(iii) Legitimate humanitarian need exists for the supplies by the people for whom intended;

(iv) Supplies will, in fact, be used for humanitarian purposes; and

(v) Adequate arrangements have been made for the distribution of the supplies in the destination country.

(b) Charity group must coordinate through USAID for approval to utilize Denton Program

(c) DSCA coordinates with USAID during the application process.

c. 10 U.S.C. § 404: Foreign Disaster Assistance

(1) Purpose: to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to

²⁰ 10 U.S.C. § 402(d)(2) authorizes the Secretary of Defense to require reimbursement for incurred transportation costs.

prevent the loss of life. Assistance provided may include transportation, supplies, services, and equipment.²¹

- (2) Approval Authority: POTUS has delegated authority to SECDEF who must have SECSTATE's concurrence.²²
- (3) Practitioner's Notes:
 - (a) Within 48 hours of commencing relief activities, POTUS must transmit a report to Congress.
 - (b) Example: providing assistance to Haiti after the significant earthquake in January 2010. Operation Unified Response, JTF- Haiti, provided logistics supplies, medical care to the victims.

d. 10 U.S.C. § 407: Humanitarian Demining Assistance and Stockpiled Conventional Munitions Assistance²³

- (1) Purpose: to carry out humanitarian demining and stockpiled conventional munitions assistance that promote either (1) the U.S. and the country where the activities will be carried out; or (2) the operational readiness skills of the armed forces who participate in the activities.
- (2) Time/Amount: No more than \$10,000,000 may be spent for equipment, services, and supplies for humanitarian demining activities per year.
- (3) Approval Authority: Service Department Secretary with specific Secretary of State approval.
- (4) Practitioner's Notes:
 - (a) No duplication of other services provided.

²¹ Transportation may be provided to prevent serious harm to the environment and where human lives are not at risk only if no other means of transportation is reasonably available.

²² Executive Order 12966 (60 Fed. Reg. 36949) (July 14, 1995) authorizes the Secretary of Defense to authorize disaster relief and begin execution in emergency situations where there is insufficient time to seek Secretary of State concurrence provided such concurrence is sought as soon as practicable thereafter.

²³ Section 1092 of the 2012 NDAA expanded the scope of 10 USC 407 to also include "stockpiled conventional munitions assistance."

- (b) Expenses covered include: travel, transportation, and subsistence expenses of DoD personnel; equipment, supplies, and services acquired for the activities.
 - (c) This authority was part of section 401 until section 407 was created (and section 401 amended) in the 2007 NDAA. Some implementing guidance, including the SAMM, still refer to demining as part of 401, but as of 17 Oct 2006, demining activities are authorized by section 407 instead of section 401.
- e. 10 U.S.C. § 2557: Excess Non-Lethal Supplies.

(1) Purpose:

- (a) For Humanitarian Relief, SecDef may transfer excess non-lethal supplies to DoS for distribution to foreign governments and civilian organizations when requested by the local U.S. embassy.
- (b) For homeless veterans, SecDef may make excess clothing, shoes, sleeping bags, and related nonlethal excess supplies available to Secretary of Veteran's Affairs on a non-reimbursable basis.
- (c) In addition, SecDef may transfer such supplies to the Department of Homeland Security (HS) at the request of the Secretary of HS in support of domestic emergency assistance activities.²⁴

(2) Practitioner's Notes:

- (a) DoD transfers the property to the appropriate Department Secretary concerned who then has the responsibility to distribute the property. **NOTE: There are several ways to transfer property to DoS (see Property Disposal section of this outline).**

²⁴ 2011 NDAA §1074 expanded this authority to include domestic emergencies.

- (b) Property must primarily benefit the intended recipient country civilians or Veterans. For foreign assistance, this may be used in conjunction with §2561 Humanitarian Assistance funds to get materials to location.
 - (c) Nonlethal Excess Supplies = property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment/material designed to inflict serious bodily harm or death.
- f. 10 U.S.C. § 2561: Humanitarian Assistance (HA).
 - (1) Purpose: Authorization to use DoD Humanitarian appropriations in order to support the national security and foreign policy goals of the U.S.
 - (a) Transportation of Humanitarian Relief
 - (b) HA – other(O)
 - (2) Practitioner’s Notes:
 - (a) Example uses of HA(O) include construction or refurbishment of local infrastructure facilities, disaster preparedness or refugee repatriation training, exercises or seminars, assessment visits, and technical and logistics assistance for foreign recipients.
 - (b) May be executed by contract rather than service members. This is distinguished from § 401 HCA, which precludes contracting due to requirement for development of operational readiness skills.
 - (c) As a transportation authority, section 2561 is the primary means to ship goods and supplies donated by NGOs/private charities to foreign countries *on a funded basis*. OHDACA funds all costs of transportation, and there is no “space available” requirement. (Compare to section 402, the Denton program.)

- (d) Section 2561's transportation authority is often used in conjunction with section 2557 to ship the non-lethal excess supplies to a recipient country.

E. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO).

The nature of operations must adapt to specific environments, and commanders often request additional or special fiscal authorities to fill any capability gaps in the general fiscal framework. Many current operating environments require counterinsurgency and counterterrorism authorities that Congress has provided to DoD upon request. These authorities, which are generally temporary, can and do change overtime, as operational environments and needs likewise change. Often, these authorities are tailored to specific locations, or they are only available for a limited period of time. Practitioners must pay particular attention to the 5Ws when using these funds.

1. Commander's Emergency Response Program in Afghanistan (CERP): 2014 NDAA §1211; 2014 CAA §9005

a. Purpose:

- (1) “authorizes United States military commanders *in Afghanistan* to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility; and
- (2) provides an immediate and direct benefit to the people of Afghanistan.”²⁵

b. Implementing Guidance: DoD FMR vol 12, ch. 27 (Note: the current version is from January 2009—Judge Advocates must ensure that guidance in the FMR, until updated, does not conflict with the most recent legislation.)

- (1) Specific Purposes: includes, but not limited to:
 - (a) water & sanitation, food production & distribution, agriculture/irrigation, electricity, healthcare, education, telecommunications, economic, financial mgmt improvements, transportation,

²⁵ 2012 NDAA §1201 repeals section 1202 of the 2006 NDAA (as most recently amended by section 1212 of the 2011 NDAA. Thus, Iraq is no longer an authorized geographic location for the use of CERP.

- (b) rule of law & governance, civic clean-up, civic support vehicles, repair civic & cultural facilities, other humanitarian reconstruction projects, battle damage, condolence payments, temporary contract guards for critical infrastructure.²⁶

(2) Specific Prohibitions:

- (a) direct or indirect benefit to US or coalition military forces; goods/services/funds to national armies; entertainment; purchase of firearms/ammo/UXO;
- (b) rewards; duplicative services; salaries/pensions for government employees; Psychological Operations; direct support for individuals or individual businesses.

c. Time: 1 year DA O&M funds

d. Amount:

(1) FY2014:

- (a) NDAA § 1201: \$60,000,000 DoD O&M
- (b) CAA §9005: \$30,000,000 DA O&M
- (c) In FY2014, Congress included a requirement that the DoD, in consultation with the DoDIG, SIGAR, SIGIR, and the GAO shall submit a comprehensive report on the lessons learned and best practices for the execution of CERP to Congress.

e. Approval Authority: as designated by theater specific policy in Afghanistan. Authority is tiered by level of command and dollar amount.

f. Limitations:

²⁶ Exhaustive list is contained in DoD FMR vol 12, chap. 23 para 270104. Contains DoD guidance for CERP and primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures.

- (1) No CERP project, to include any ancillary or related elements of the project, may be in excess of \$20,000,000.
- (2) Projects \geq \$5,000,000:
 - (a) Require 15 days prior written notice to Congressional Defense Committees of:
 - (i) Location, nature, purpose of proposed project, including how it is intended to advance the military campaign plan
 - (ii) Budget and implementation timeline
 - (iii) Sustainment plan
 - (b) Require approval of the Afghanistan Resources Oversight Council (AROC) of the DoD. (see 2012 DoDAA §9009)
- (3) Construction: DoD FMR para 270102 no longer includes the concept of “build” and instead focuses on “reconstruction” and “restore.” However, it specifically indicates that this does not limit efforts to restore previous conditions/structures in Afghanistan. Judge Advocates should look to the most recent version of the MAAWS-A when in theater for more specific guidance on the extent of construction authorized using CERP.

g. Practitioner’s Notes:

- (1) The focus is on small-scale projects that immediately assist the local population and are sustainable. Small-scale would generally be considered less than \$500,000 per project according to the DoD FMR.
- (2) Urgent is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action.
- (3) Section 1201 of the 2012 NDAA contains authority for the Secretary of Defense to waive any other provision of law that would prohibit, restrict, limit, or otherwise constrain

exercise of the CERP authority. In the past, SecDef has waived certain requirements of the FAR as well as the Foreign Claims Act (FCA). As Congress repealed CERP authority in previous versions of the NDAA, practitioners should look for new waiver authorities before assuming that the certain FAR provisions or FCA do not apply.

- (4) Historical Information: CERP was originally funded with seized Iraqi assets.²⁷ The Coalition Provisional Authority (CPA) accounted for the seized funds, administered, and distributed the funds to U.S. Commanders in Iraq for “reconstruction assistance” to the Iraqi people.²⁸ Congress first appropriated funds under CERP for both Iraq and Afghanistan in the FY 2004 ESAA.

2. Reintegration Activities in Afghanistan: currently in 2014 NDAA §1212 (originally created in 2011 NDAA§1216)

- a. Purpose: to support the reintegration into Afghan society of those individuals who pledge—
 - (1) To cease all support for the insurgency in Afghanistan
 - (2) To live in accordance with the Constitution of Afghanistan
 - (3) To cease violence against the Government of Afghanistan and its international partners, AND
 - (4) Have no material ties to al Qaeda or affiliated transnational terrorist organizations.
- b. Time: authority through 31 December 2014.
- c. Amount: no more than \$25,000,000 of DoD O&M.
- d. Limitations:

²⁷ See CJTF-7 FRAGO 89; see also Memorandum, The President to the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003).

²⁸ CJTF-7 FRAGO 89. *Id.* The Coalition Provisional Authority (CPA) initially defined reconstruction assistance as “the building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq.” The CPA provided approximately \$78.6M for over 11,000 projects, such as financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

- (1) 2012 NDAA §1219 requires that no more than 50% of funds available may be used until SecDef (in consultation with SecState) certifies to Congress that women are an “integral part of the reconciliation process” with GIRoA and the Taliban.
 - (2) 2012 DoDAA §9009 requires that AROC approve all projects and the execution plan.
- e. Practitioner Notes:
 - (1) This authority was initially created as an authorized use of CERP in FY 2010 NDAA §1222. The MAAWS-A includes a separate Reintegration SOP that discusses the program as a part of CERP.
 - (2) The 2011 CAA specifically authorizes the use of the DoS ESF and INCLE appropriations for reintegration activities as well.
3. Afghanistan Infrastructure Fund (AIF): currently at 2014 NDAA §1215 (originally created in 2011 NDAA §1217)
 - a. Purpose: to develop and carry out infrastructure projects in Afghanistan of the following types:
 - (1) Water, power, and transportation projects and related maintenance and sustainment costs
 - (2) Other projects in support of the counterinsurgency strategy in Afghanistan
 - b. Time:
 - (1) FY 14 funds through 30 September 2015
 - (2) NOTE: the DoD O&M fenced off under this program specifically remains available beyond the normal 1 year period for O&M
 - c. Amount: \$250,000,000 per FY

- d. Limitations: SecDef may not use more than 85% of amount authorized until submitting a plan (in consultation with SecState) on allocation and use of the funds to appropriate congressional committees
- e. Practitioner Notes:
 - (1) This was a newly created authorization in FY2011 for those larger scale projects that Congress felt inappropriate for use of CERP.
 - (2) SecState and SecDef will jointly develop projects, and DoS will implement in coordination with DoD unless it is jointly determined that DoD should implement.
 - (3) Congressional notification of 30 days prior is required before obligating or expending funds to carry out a project or transfer to DoS.

4. Rewards Program: 10 U.S. C. § 127b

- a. Purpose: to allow the military to pay monetary rewards to people for providing 10 U.S. Government with information or nonlethal assistance (NOT a weapons buyback) that is beneficial to:
 - (1) An operation or activity of the armed forces conducted outside the U.S. against international terrorism; or
 - (2) Force protection of the armed forces or of allied forces participating in a combined operation.
- b. Time: 2013 NDAA § 1021 reauthorizes O&M funding for this authority until 30 September 2014.
- c. Amount: An individual award cannot exceed \$5 million
- d. Approval Authority: By statute, SECDEF is the primary approval authority. (Secretary of State concurrence required over \$2M.) Also by statute, SECDEF may delegate this authority as follows:
 - (1) To the Deputy, SECDEF or an Under SECDEF without further redelegation; and

- (2) To the COCOM Commander authority to approve individual awards not in excess of \$1M. The COCOM Commander may further delegate (with SECDEF or primary delegate approval) authority to approve individual awards up to \$10,000 to his or her deputy commander or to a direct subordinate commander.
- e. Practitioner's Notes:
 - (1) Implemented in DoD FMR vol 12, ch 17
 - (2) Not a weapons buy-back program.
 - (3) U.S. citizens, U.S. officers/employees, or employees of a contractor of the U.S. are not eligible to receive rewards.
 - (4) Theater regulations will provide delegation amounts to subordinate commanders. Practitioners must note that the dollar thresholds are subject to both legislative and policy changes frequently.
- 5. Afghanistan Security Forces Fund (ASFF): currently in 2014 NDAA § 1531; 2012 DoDAA (Title IX Overseas Contingency Operations)
 - a. Purpose: to provide assistance, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, Facility and infrastructure repair, renovation, and construction, and *funding*.”
 - b. Time/Amount:
 - (1) 2014 CAA: \$4,726,720,000 (avail. thru 30 Sep 2015)
 - (2) 2013 CAA: \$5,124,167,000 (avail. thru 30 Sep 2014)
 - (3) 2012 DoDAA: \$11,200,000,000 (avail. thru 30 Sep 2013)
 - c. Approval Authority: Commander, Combined Security Transition Command-Afghanistan (CSTC-A)
 - d. Limitations:

- (1) no funds may be obligated until approval of a financial and activity plan by the Afghanistan Resources Oversight Council (AROC) of the DoD
- (2) AROC must approve all annual service requirements over \$50,000,000 and any non-standard equipment request over \$100,000,000.

e. Practitioner Notes:

- (1) These funds are an exception to the general rule that no funds shall be used to provide training or advice to police, prisons, or other law enforcement forces or military training for any foreign government.
- (2) Security Forces of Afghanistan: those forces under the control of the GIROA
 - (a) Afghan National Army (ANA),
 - (b) Afghan National Police (ANP),
 - (c) Afghan Local Police (ALP)

6. Office of Security Cooperation-Iraq (OSC-I) Support: 2014 NDAA § 1214 and 2012 DoDAA §9013

a. Purpose: life support, transportation and personal security, construction and renovation of facilities for

- (1) operations/activities of OSC-I;
- (2) (2) operations and activities of security assistance teams in Iraq

b. Time/Amount: up to \$209,000,000 of AF O&M

c. Practitioner Notes:

- (1) Sec. Def must provide 15 day prior written notice to congressional defense committees with detailed

justification and timeline for each proposed site and use of funds

- (2) The primary beneficiary of these funds is the U.S., although not necessarily just DoD.

VI. PROPERTY DISPOSAL

A. Overview of DoD Property Disposal.

1. Statutory authority is required for any transfer or sale of government owned or purchased property, particularly if transferred to a foreign military, government, or population. Although the overarching principles of the Federal Property and Administrative Services Act apply to both real and personal property, this outline will focus on personal property disposition.
2. An understanding of the statutorily mandated processes for the disposition of excess personal property is necessary to properly evaluate the authority for a proposed disposition. Generally speaking, the mandated processes involve reutilization, transfer, donation, and sale (R/T/D/S), and if none of these are possible, abandonment/destruction (A/D) through “donation” or disposal contracts. The order in which these processes are executed and the priority assigned to potential requisitioners or transferees is also mandated. Thus, reutilization screening within the DoD must occur before the property can be considered for transfer, donation, or sale. Similarly, transfer to federal civilian agencies must be ruled out before property can be offered for sale. No property can be put on a disposal contract unless it is not eligible for a “higher priority” process, or the opportunities for such transfers have been exhausted, and the property is not wanted by a qualified²⁹ higher priority transferee.
3. The operational funding framework is useful in determining proper statutory authority for disposal of DoD property. Specifically to identify the proper authority and process for property transfer, judge advocates must determine who is receiving the property, what is the property classification, when will the property be transferred, where will it be transferred, and why will it be transferred. The following is an overview of (1) the general authority related to property disposal, (2) the process variations involved in planning for property disposition within contingency operations. Although specific guidance changes frequently in

²⁹ Due to regulatory limitations on certain types of property, especially defense articles, release of many items are restricted to specified transferees such as military requisitioners.

the operational environment, the basic framework of disposition and transfer authorities has been in place for decades.

B. General Authority and Mechanism for Disposal of DoD Property – 40 U.S.C. § 501-574 and 701 et seq.

1. Purpose:

- a. To give the Administrator, GSA the responsibility for management of U.S. Government owned property, to include procurement, storage, use, and disposition.³⁰
- b. Within the DoD, the disposal authority has been delegated to the Defense Logistics Agency (DLA) Disposition Services (formerly known as Defense Reutilization and Marketing Service – DRMS)³¹ to establish a standardized process for the disposal of durable (investment item) DoD property (including military equipment) purchased with appropriated funds.
- c. For property located overseas, Agency heads are given responsibility for management of property owned by their Agency subject to the requirement that such use and disposition be consistent with US foreign policy (*see* 40 USC 701).
- d. Relevant Statutory and Regulatory Definitions:³²
 - (1) Surplus: excess property that is no longer required to meet the needs or responsibilities of *any* federal agency.
 - (2) Excess: property that is not required to meet the needs of the federal agency that initially procured the property, but may be required by other federal agencies. For example, with respect to DoD property, “excess” means property no longer needed by any DoD component. However, note that individual service regulations will define “excess” as

³⁰ The Secretary of Defense may exempt itself for national security purposes (see § 501).

³¹ With respect to disposition of excess DoD property located within the United States, Disposition Services derives its statutory authority from a delegation of disposal authority to the Secretary of Defense by the Administrator of the GSA. Disposition Services is a subordinate element of the DLA; subsequent delegations within the DoD result in Disposition Services having responsibility for disposal of excess property. With respect to foreign excess personal property, the statute provides Agency heads with the responsibility for property disposition. See 40 USC 701. Again, several delegations from the Secretary of Defense to DLA to Disposition Services result in the latter’s responsibility for property disposal.

³² 40 U.S.C. § 102

property no longer needed by that individual service component, thus warranting turn-in to Disposition Services. From a statutory perspective; however, property is not “excess” unless it is not required by a component or activity within that Agency.

- (3) Disposal: the reutilization, transfer, donation, sale, abandonment, or destruction of excess and surplus federal government property.
- (4) Foreign Excess Property: excess property that is not located in the States of the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands.³³ Foreign excess personal property is simply the subset of foreign excess property that is “personal” or “moveable” rather than consisting of real property. FEPP includes all personal property held by the Agency regardless of property class or type.
- (5) Reutilization: when an element of a federal agency receives ownership of, and reuses, federal government property that was initially procured by another element of the same federal agency. Within DoD, “reutilization” means transfer to another military service or DoD component or transfer under a program that has top level priority (Priority 1) per statutes applicable to DoD property.
- (6) Transfer: when a federal agency receives ownership of federal government property that was initially procured by another federal agency. Within DoD such transfers are referred to as Federal Civilian Agency (FCA) transfers.
- (7) Donation: when surplus federal government property is given to authorized state governments/agencies, or to a small group of designated private organizations.
- (8) Property: limiting definition which excludes certain real property and also expressly excludes certain military items such as “naval vessels that are battleships, cruisers, aircraft carriers, destroyers, or submarines.” Likewise, it excludes “records of the Government.”

³³ 40 USC 701

- (9) Usable Sales: sales of federal government property to the general public (usually via auctions) for full use in the manner originally intended.
- (10) Scrap Sales: sales of federal government property to the general public (usually via auctions) for use of the components.
- (11) Abandoned: federal government property without any private or public value.³⁴
- (12) Destroyed: federal government property that may not be sold or abandoned must be destroyed. In cases where property is not appropriate to be transferred to other parties, or there are no eligible parties interested in a no cost transfer/abandonment, the Agency must pay for property destruction of the material. Hazardous and non-recyclable wastes are examples of such properties.

2. Limitations:

- a. The disposal procedure chosen for a specific piece of government property must conform to all DoD and U.S. government (USG) statutory and regulatory restrictions. For example, although Disposition Services may “abandon” some types of government property, it may not “abandon” an article that is a defense article (for example: a nuclear warhead), because this would violate statutory and regulatory procedures for the disposal of such items. Similarly, in order to effect a specific type of disposition transaction, opportunities for any higher priority transfer or disposition must have been exhausted or properly waived. For example, before competitive sales to the public can be undertaken, screening for potential reutilization, transfer or donation transactions must have been performed and failed to identify a potential recipient for the property. Before transfer or donation of FEPP to a foreign government, world-wide DoD screening must fail to produce results unless the requirement to screen the property has been waived at the DUSD, (L&MR) level.³⁵

³⁴ Proper procedures for abandonment and destruction are found in DoD 4160.21-M, chapter 8. *See also* DRMS-I 4160.14, chapter 8 for environmental compliance rules.

³⁵ DoD 4160.21-M, Ch. 9.

- b. Property is requisitioned on an “as is/where is” basis.³⁶
- c. Non-DoD requisitioners and purchasers must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the property. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

3. Practitioner Notes:

- a. Disposition Services co-locates its subordinate Disposition Services Officers (formerly DRMO’s) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.
- b. DLA Disposal Process: In accordance with statutorily mandated processes, Disposition Services assigns the following four priorities to government elements requesting Disposition Services –managed property (*See* DRMS-I 4160.14):
 - (1) Priority 1 – Reutilization: Initial 14-day window where DoD property that is turned into disposition services may only be requisitioned by another DoD component or designated non-DoD “Special Programs” such as the DoS Foreign Military Sales program.³⁷
 - (2) Priority 2 – Transfer: the next 21-day window where property not reutilized during priority 1 phase may be requisitioned by another USG agency.
 - (3) Priority 3 – Donation: the next 5-day window where property not transferred to another USG agency may be donated to an approved state government or organization.
 - (4) Priority 1-3 “Final Screening”: the 2-day window where property not donated undergoes a final screening and “last chance” requisition window for all priority 1-3 components, agencies, and approved governments and organizations.

³⁶ *See* DRMS-I 4160.14.

³⁷ Other special programs include Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

- (5) Priority 4 – Sales: window of time where property not requisitioned during priority 1-3 periods may be now sold to the general public via “usable sales” or “scrap sales.” Property with military capabilities must be demilitarized to be eligible for sale. If unable to demilitarize, the property must be destroyed.
- (6) Abandonment or Destruction: property not requisitioned during priorities 1-4 may now be abandoned or destroyed. Abandonment includes the “donation in lieu of abandonment” process for property utilizing the Economy formula which essentially provides that property may be given away when efforts at sale have failed or the cost of its care and handling incident to sale would exceed any estimated proceeds. This is a “cost avoidance” principle. However, ordinary limitations on transfer apply precluding release of such items as defense articles or hazardous waste to the public.

C. Foreign Excess Personal Property (FEPP) – 40 U.S.C. 701(b)(2)(B).

- 1. Purpose: an overview of requirements and transfer
 - a. Authorizes the head of an executive agency to “dispose of foreign excess property in a manner that conforms to the foreign policy of the United States.”³⁸
 - b. This law has received recent attention and application, as the U.S. continues drawdown in Afghanistan. Practitioners of fiscal law are often asked about “retrograde” operations, a term that loosely encompasses the process of transferring equipment.³⁹
 - c. The statutory and regulatory guidance applies to FEPP regardless of whether it is generated in the “installation” (i.e., bases under arrangements with foreign states) or “operational” setting (i.e., contingency operations).

³⁸ Chapter 9 of the Defense Material Disposition Manual, DoD 4160.21-M provides DoD guidance on FEPP disposal.

³⁹ Army Doctrine Reference Publication 3-0 defines “retrograde” as a defense task. Many operators and fiscal attorneys use this term when referring to the property disposition process. The term as it is used in the context of property transfer in Afghanistan, does not squarely fit within the doctrinal definition. Judge Advocates should ensure they understand the actual command intent with regard to a “retrograde” operation in order to avoid confusion.

- (1) The processes are the same as for excess property generated stateside. That is, “reutilization, transfer, donation, sale, abandonment/destruction” unless screening waivers apply. These processes apply as policy guidance set forth in Agency regulation, rather than statutory mandate.
 - (2) There is greater ability to vary screening and reutilization processes in the operational setting in order to meet operational needs or due to resource limitations. In Afghanistan, for example, fragmentary orders set forth the multi-step screening and reutilization process that applied before usable property could be transferred to the host nation or turned into DLA Disposition Services as unserviceable excess. Although the screening time frames and methods varied from what DoD property would undergo in CONUS, the statutory requirements with respect to priority of requisitioners/transferees were maintained.
- d. Prior to conducting public sales of surplus property on the local economy, coordination of an agreement with the host nation authorizing sales of DoD excess property or the approval of DoS must be obtained.⁴⁰ When DoD brings property into the territory of the host nation, it does so “duty free.” The later transfer or sale of excess property to private parties in the host nation ordinarily triggers the incidence of import taxes or duties as the property loses its “tax exempt” status. There may be other restrictions related to the entry of used property on the local economy which also need to be addressed.
- e. “Retrograde” or “re-set” are not truly property “disposal” processes as they are not actions involving “excess” property. Instead the terms refer to property management processes or actions taken to return “non-excess” property to its pre-deployment location or to re-set it to another setting for continued future use by a DoD entity or military service. Property not selected for retrograde or re-set may be declared “excess” by the owning unit or service and, assuming no higher priority transfers are available may become eligible for transfer to a foreign government for the following purposes. Judge Advocates should ensure that they

⁴⁰ See DoD 4160.21-M, ch. 9.

understand the actual command intent with regard to “retrograde.”⁴¹

- (1) As a “donation of medical supplies to a non-profit medical or health organization” in accordance with 40 USC 703;
- (2) In “exchange for substantial benefits or the settlement of claims,” in accordance with 40 USC 704(b)(2)(B), if approved by the ASD for Logistics & Material Readiness; or
- (3) As a donation in lieu of abandonment in accordance with 40 USC 704(b)(3) and DoD 4160.21-M, ch. 8 where the economy formula requirements are met.

2. Time/Amount for “Substantial Benefits” FEPP Transfers:

- a. Implemented by delegation memorandum in response to specific requests. Often such authorities provide “blanket” authority for a certain period or as long as certain conditions apply in the operational setting. OEF requests have focused on transfers of FEPP incident to a FOB closure or transfer, and transfers of FEPP in situations that do not involve a base closure.
- b. Current monetary limit for property value for a single base closing or transferring of a FOB in Afghanistan is \$30,000,000.⁴²
- c. Approval Authority Levels for individual property transfer amount is tiered by rank and designated in delegation memorandum. Current approval authority levels for individual property transfers in Afghanistan (Note: monetary value is based on depreciated value):
 - (1) \$0 - \$75,000: O-6 Level Commander
 - (2) \$75,000.01 - \$500,000: First GO/FO in the Chain of Command

⁴¹ F.M. 3.0 defines “retrograde” as a defense task involving “movement away from the enemy. This includes delays, withdrawals, and retirements.” Many operators and fiscal attorneys use this term incorrectly when referring to the property disposition process. Instead of effecting a disposal, retrograde involves the management of property that will be retained somewhere by a component of the DoD.

⁴² See Memorandum, Alan F. Estevez, Principal Deputy to the Assistant Secretary of Defense for Logistics and Material Readiness, to Commanding General, US Forces, Afghanistan, Subject: Authority to Transfer U.S. Foreign Excess Personal Property (FEPP) in Afghanistan (23 JAN 2012).

(3) \$500,000.01 - \$30,000,000: CDR or DCSR-A, USFOR-A

(4) \$30,000,000.01 and above: ASD (L&MR)

3. Practitioner Notes:

a. “FEPP is a distinct category of property not to be confused with “excess and surplus.”⁴³ This distinguishing definition is important to practitioners, as the process required by law and statute for “excess and surplus” and “FEPP” may be different. The disposal process outlined in section B above is statutorily mandated for “excess and surplus” property. However, per DoD disposal policy, the standard R/T/D/S processes should also apply to the management and disposition of FEPP unless waivers have been obtained.

(1) Screening waivers are often granted in conjunction with the grant of specific FEPP transfer authority in the operational setting. This is often due to system and resource limitations for federal civilian agency and state agency screening in the operational setting.

(2) Judge Advocates involved in “retrograde” operations (return of property that will remain under DoD control) and transfer (for purposes of disposal under 40 USC chapter 7 or security assistance under Title 10) should understand that transfers under the FEPP program will also affect procedures for property accountability under AR 735-5. This regulation explains, among other topics, the methods to account for and remove government property on the “property book” of a military unit.

b. To date, there have been numerous memoranda that authorize FEPP transfers in Afghanistan. These memoranda initially involved transfers authorized under 40 USC 704(b)(3) and currently pursuant to 40 USC 704(b)(2)(B).

(1) Based on various requests from the theater or combatant command, the authorizations have increased the value of property to be transferred, how the values were calculated. Types of property involved, added eligible transferees, added locations from which property could be transferred,

⁴³ DoD 4160.21-M, ch. 9, para. A(1).

and increased transfer justification and documentation requirements. Judge Advocates should ensure that they are operating with the most current authorization if engaged in FEPP in these environments.

- (2) The transfer authorities cited in Title 40 are “disposition” based and do not authorize the transfer of defense articles. “Security Assistance” based authorities must be used to properly justify the transfer of defense articles.

- D. Excess Defense Articles (EDA) Transfers: See section VII.C.2.(c) *infra*.
- E. Afghanistan Defense Articles and Services Transfer: 2010 NDAA § 1234 (current extension at 2013 NDAA § 1222)
 1. Purpose: to transfer defense articles from DoD stocks and to provide defense services in connection with the transfer to the military and security forces of Iraq and Afghanistan to support the efforts of those forces in restoring and maintaining peace and security
 2. Time: authority expires Dec. 31, 2014.
 3. Amount: aggregate replacement value of articles transferred and services provided may not exceed \$250,000,000 (value of Excess Defense Articles transferred under Foreign Assistance Act do not count against this amount)
 4. Approval Authority: Secretary of Defense with concurrence of Secretary of State. Prior to the exercise of this authority, SECDEF must provide a report on the plan for disposition of equipment in Afghanistan to appropriate congressional committees.

VII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS (TITLE 22)

A. Introduction

1. General Rule: The Department of State (DoS) has the primary responsibility to establish policy and conduct Foreign Assistance on behalf of the USG— even during U.S. Military Operations.⁴⁴ The legal authority

⁴⁴ See *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984)

for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.⁴⁵

2. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to the population of a foreign nation, including disaster relief).
3. Human Rights and Foreign Assistance.
 - a. The “Leahy Amendment,” first enacted in the 1997 Foreign Operations Appropriation Act (DoS Appropriations Act)⁴⁶ prohibits the USG from providing funds to the security forces of a foreign country if the DoS has credible evidence that the foreign country or its agents have committed gross violations of human rights unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.
 - b. This language is found in yearly DoD Appropriations Act prohibiting the DoD from funding any training program involving a unit of the security forces of a foreign country if the DoS has credible information that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken. The current version of the Leahy Amendment is contained in the 2014 CAA §8057.

B. Framework for DoS Foreign Assistance Authorizations and Appropriations

1. As the primary agency responsible for foreign assistance, DoS, (through its Director for Foreign Assistance (DFA)) has identified five broad foreign assistance objectives: (1) Peace & Security; (2) Governing Justly

⁴⁵ The Director of U.S. Foreign Assistance within the Department of State is charged with directing U.S. foreign assistance in accordance with foreign policy objectives. Information can be found at <http://www.state.gov/f/index.htm>.

⁴⁶ See Pub. L. No. 105-118, Foreign Operations, Export Financing, and Related Programs Appropriations Act, section 570, “Limitation on Assistance to Security Forces.”

& Democratically; (3) Investing in People; (4) Economic Growth; and (5) Humanitarian Assistance.⁴⁷

2. Funding these objectives involves multiple funding sources. A complete review of all DoS funding sources and initiatives for foreign assistance is beyond the scope of what Judge Advocates will encounter in the military operating environment. Therefore, this outline will focus on those DoS foreign assistance authorizations and appropriations that interface with DoD operations.
3. “The Players”: Administering and performing foreign assistance missions under DoS policy and funding authority involves multiple agencies and/or departments. Of primary importance for Judge Advocates are:
 - a. DoS: assists the President in formulating and executing the foreign policy and relations of the United States of America. The Director, U.S. Foreign Assistance coordinates foreign assistance programs of both DoS and the United States Agency for International Development (USAID).⁴⁸
 - b. USAID: reports to and serves under the “direct authority and foreign policy guidance” of the Secretary of State. USAID administers the bulk of bilateral economic aid, including disaster relief, economic growth, global health, and food assistance. USAID appropriations are generally included under the DoS Title within the current CAA.
 - c. DoD:
 - (1) Defense Security Cooperation Agency (DSCA): DoD organization charged with implementing multiple DoS funded and controlled security assistance programs involving transfer of defense articles and services.
 - (2) Military Departments and Combatant Commanders: execute many of the programs implemented by DSCA.

⁴⁷ See “Foreign Assistance Standardized Program Structure and Definitions,” April 8, 2010, *available at* <http://www.state.gov/documents/organization/141836.pdf> (last accessed Feb. 19, 2014). Each of these broad programs contains several sub-elements.

⁴⁸ United States Agency for International Development (USAID) is an independent federal government agency that receives overall foreign policy guidance from the Secretary of State. USAID was created by Executive Order after the enactment of the 1961 Foreign Assistance Act and became an independent agency in 1999.

4. Accessing the DoS Appropriations and Authorizations. For the deployed unit, properly coordinating for access to the DoS/USAID appropriations and authorizations becomes critical. In a non-deployed environment, a DoD unit would normally coordinate with the Defense Security and Cooperation Agency (DSCA) and follow the procedures of the Security Assistance Management Manual (SAMM).⁴⁹
5. Within this narrowed framework, DoS authorizations and appropriations for conducting foreign assistance that interact with DoD may be grouped into three general subcategories consistent with DoS objectives: (1) Peace & Security Assistance, (2) Governing Justly & Democratically, and (3) Humanitarian Assistance.

C. Peace & Security Assistance (SA).

The majority of interaction of DoD with the DoS SA programs falls under the authorizations within The Foreign Assistance Act of 1961 (FAA)⁵⁰ and The Arms Export Control Act of 1976 (AECA).⁵¹ Congress frequently amends these Acts in the annual DoS and DoD appropriation acts. Judge Advocates may find it beneficial to consider these programs in two general subcategories: reimbursable and U.S.-financed.

1. Reimbursable Security Assistance

a. Foreign Military Sales (FMS) - 22 U.S.C. § 2761 (AECA §§ 21-27).

- (1) Purpose: Contracts or agreements between an authorized foreign purchaser and the U.S. for the sale of DoD defense articles, services, and training from existing stocks or new procurements for the purpose of internal security, legitimate self-defense, participation in regional/collective arrangements consistent with the UN charter, or to enable foreign military contribution to public works and civic action programs.
- (2) Time/Amount: FMS is a “Revolving Fund,” with the intent of being self-funded. As such, no annual appropriation is required.

⁴⁹ DSCA implements those security assistance programs involving the transfer of defense articles or services. Regulatory guidance can be found in DoD 5105.38-M, “Security Assistance Management Manual,” [hereinafter SAMM], available at <http://www.dsca.osd.mil/samm/>.

⁵⁰ 22 U.S.C. § 2151 et seq.

⁵¹ 22 U.S.C. § 2751 et seq.

- (a) DoS is authorized to charge an administrative fee to the foreign purchasing nation for each “case” (sale) to reimburse the U.S. for administrative costs.
 - (b) This fee allows DoS to generate the funds necessary to reimburse the appropriate DoD account via an Economy Act transaction, or other reimbursement authority in another statute.
 - (c) Unless an exception applies under the statute, payment must be made in advance of delivery of the defense article/service and must be made in U.S. dollars.
- (3) Approval Authority:
- (a) Countries or international organizations are only eligible for FMS transactions if the POTUS makes a determination of their eligibility.⁵² DoS then determines whether an FMS case is approved. Current eligibility criteria:
 - (i) Furnishing of defense articles / services must strengthen U.S. security and promote world peace.
 - (ii) No re-transfers without Presidential consent.
 - (iii) No use of articles / services for purposes other than for which furnished, unless consent of the President has first been obtained.
 - (iv) Recipient must maintain security of such article.
 - (b) The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via the Defense Security Cooperation Agency (DSCA). Practitioners can find additional information on this implementation in the Security

⁵² SAMM, Table C4.T2 contains a list of current eligibility status for Countries and International Organizations.

Assistance Management Manual (SAMM) chapters 4-6 as well as online at <http://www.samm.dsca.mil/>.

(4) Limitations:

- (a) The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform to the restrictions of the DoS International Traffic in Arms Regulations (ITARs).⁵³
- (b) ITAR-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program. (See *infra*, V.C.1.c.).

b. Foreign Military Lease Program (FML)- 22 U.S.C. § 2796-2796a (AECA §§ 61-62).

- (1) Purpose: Authorizes leases of Defense articles to foreign countries or international organizations provided there is a compelling foreign policy and national security reason for lease rather than sale.

(2) Time/Amount:

- (a) The leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program (*See infra*, III. C. 1.).
- (b) The lessee must pay in U.S. dollars all costs incurred by the U.S. in leasing, to include depreciation.
- (c) Leases must be for a fixed duration not to exceed 5 years.

- (3) Practitioner's Notes: DSCA executed program on behalf of DoS.

⁵³ 22 CFR part 121

c. Direct Commercial Sales (DCS) Program - 22 U.S.C. § 2778

- (1) Purpose: Authorizes eligible governments to purchase defense articles or services directly from defense contractors.
- (2) Time/Amount: DoD is not involved in the management of the sale from the contractor to the foreign nation.
- (3) Practitioner Notes:
 - (a) A DoS review and “export license” is required from the Directorate of Defense Trade Controls before the contractor may provide the products to the foreign nation.⁵⁴
 - (b) Some Significant Military Equipment (SME) must be purchased through FMS.

2. U.S. Financed DoS Security Assistance.

a. Foreign Military Financing (FMF) Program - 22 U.S.C. § 2763 (AECA § 23); 22 U.S.C. § 2311 (FAA Part II, Ch. 2).

- (1) Purpose: to finance, through grants or loans, the acquisition of defense articles, services, and training (through the FMS/FML or DCS programs) by friendly foreign countries to strengthen U.S. security and foreign policy.
- (2) Time: 1 year period of availability.⁵⁵ Loaned funds must be repaid over a period not to exceed 12 years unless otherwise approved by Congress.

Amount: FY 2014 CAA appropriated \$5,389,280,000 (note: there are additional caveats and instructions on use).

(3) Practitioner’s Notes:

⁵⁴ See ITAR part 123 for regulatory procedures for licensing to export defense articles.

⁵⁵ Sec 7011 of 2010 CAA (Pub. L. No. 111-117), provides that if such funds are initially obligated before the expiration of period of availability, they shall remain available for an additional 4 years. *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf.

- (a) Responsibility of the Asst. Sec. for Political-Military Affairs/ Under Sec. for Arms Control & International Security.
 - (b) DSCA executed program on behalf of DoS.
 - (c) U.S. financing through Foreign Military Financing (FMF- discussed *infra* section V.C.2.a) is only approved on a limited case-by-case basis.⁵⁶
- b. Presidential Drawdowns- Foreign Assistance Act of 1961 and Special Legislative Authorities.

Directives by the President pursuant to the FAA or other special legislation for DoD to transfer on-hand defense articles and services (including military education and training) to a foreign country, their military or security services, or the foreign civilian population. The items need not be “surplus” or “excess.”

- (1) Emergency Drawdown Authority - 22 U.S.C. § 2318(a)(1)⁵⁷
 - (a) Purpose: for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization that can’t be addressed under AECA or any other law.
 - (b) Time/Amount: defense articles and services of an aggregate value of up to \$100,000,000 in any fiscal year.
 - (c) Limitations: Requires presidential determination (PD) and prior congressional notification (CN).
- (2) Nonemergency Drawdown Authority - 22 U.S.C. § 2318(a)(2).⁵⁸

⁵⁶ See “Defense Security Cooperation Agency Guidelines for Foreign Military Financing of Direct Commercial Contracts,” August 2009.

⁵⁷ Foreign Assistance Act (FAA) § 506(a)(1)

⁵⁸ FAA § 506(a)(2)

- (a) Purpose: for international narcotics control, disaster relief, antiterrorism assistance, nonproliferation assistance, and migration and refugee assistance.
 - (b) Time/Amount: articles and services of an aggregate value of up to \$200,000,000 from any agency of the U.S. in any fiscal year.
 - (i) Of that amount, not more than \$75M may come from DoD resources;
 - (ii) not more than \$75M may be provided for counternarcotics;
 - (iii) and not more than \$15M to Vietnam, Cambodia and Laos for POW accounting.
 - (c) Limitations: Drawdowns supporting counternarcotics and refugee or migration assistance require PD 15-day prior CN.⁵⁹
- (3) Peacekeeping Operations Drawdown Authority -, 22 U.S.C. § 2348a(c)(2).⁶⁰
- (a) Purpose: provision of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.
 - (b) Time/Amount: of an aggregate value up to \$25,000,000 in any fiscal year.
 - (c) Limitations: Requires PD and prior CN.
- (4) Special Legislation Drawdown Authorities.
- (a) Iraq Liberation Act of 1998 - Pub.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998).

⁵⁹ See Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996); FY 2001 Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

⁶⁰ FAA § 552(c)(2).

- (i) Purpose: defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations.
 - (ii) Time/Amount: may not exceed \$97 million.⁶¹
 - (iii) Limitations: requires 15 day prior CN.
- (b) Afghanistan Freedom Support Act of 2002 – 22 U.S.C. § 7532.
 - (i) Purpose: Presidential authority to drawdown defense articles and services, and military education and training for the Government of Afghanistan and other eligible foreign countries/ international organizations.⁶² The assistance may also be provided by contract.
 - (ii) Time/Amount: of an aggregate value not to exceed \$550,000,000. Amounts appropriated for reimbursement of this authority increase this limitation on aggregate value.⁶³
- c. Excess Defense Articles (EDA) - 22 U.S.C. § 2321j.
 - (1) Purpose: to offer, at reduced or no cost, lethal and non-lethal defense articles declared as excess by the Military Departments to foreign governments or international organizations in support of U. S. national security and foreign policy objectives.
 - (2) Time/Amount: the aggregate current market value of EDA transferred in a fiscal year may not exceed \$425,000,000.

⁶¹ President Bush subsequently directed \$92 million in drawdown assistance in 2002. *See*, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002). Unique to drawdowns, Congress subsequently appropriated \$63.5M reimbursement for IFSA drawdown support. *See*, Sec. 1309 of the FY03 Emergency Wartime Supplemental Appropriation.

⁶² This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act.

⁶³ For example, Congress also provided \$165M reimbursement for the AFSA Drawdown. *See*, Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

- (a) Prior to sale, the value of the item may be depreciated.
 - (b) EDA may be purchased by foreign nations, or they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. While both sales and grants are authorized, sales are rarely conducted under this authority – grants are the primary type of transfer.
 - (c) DoD procurement funds may not be expended in connection with the transfer.
- (3) Limitations:
- (a) Must notify Congress 30 days prior to transfer of any SME or EDA valued at \$7,000,000 or more.
 - (b) Generally, DoD funds may not be expended for packing and transport of EDA. As an exception, where DoS determines it is in the U.S. national interest, no-cost space available transportation is authorized for countries receiving less than \$10M FMF or IMET in any fiscal year.
- (4) Practitioner Notes:
- (a) EDA are those defense articles no longer needed by DoD, even if that type of item is still regularly used by DoD units.⁶⁴ The determination of excess is made by Defense Logistics Agency (DLA) Disposition Services.
 - (b) Articles must be drawn from existing stocks of DoD (for purposes of EDA, the Coast Guard is considered part of DoD).
 - (c) Transfer of articles must not have an adverse impact on military readiness.
 - (d) DSCA executed program on behalf of DoS.

⁶⁴ SAMM, paragraph C11.5.1

d. Complex Crises Fund (CCF) –FY 2014 Continuing Appropriations Act (CAA).

- (1) Purpose: support activities to prevent or respond to emerging or unforeseen crises that address reconstruction, security, or stabilization needs.
- (2) Time: through 30 September 2015
- (3) Amount: \$20,000,000
- (4) Practitioner Notes:
 - (a) The CCF replaces the §1207 Security and Stabilization Assistance Transfer Authority as authorized and appropriated for DoD.
 - (b) The CCF will focus on “advancing peace and stability” with projects aimed to “address and prevent root causes of conflict and instability...”⁶⁵

e. International Military Education & Training (IMET) - 22 U.S.C. §§ 2347-2347d.

- (1) Purpose: program to fund the military training of foreign soldiers and certain related civilian personnel⁶⁶ at U.S. military schools in order to:
 - (a) Encourage effective relationships and understanding between the U.S. and foreign countries to further international peace and security;
 - (b) Improve ability of participating countries to utilize their resources for greater self-reliance; and

⁶⁵ DoS Executive Budget Summary, Function 150 & Other International Programs, available at <http://www.state.gov/documents/organization/135888.pdf>.

⁶⁶ Foreign civilians who are not members of the government may only be provided training under this authority if it (1) would contribute to responsible defense resource management, (2) foster greater respect for and understanding of the principle of civilian control of the military, (3) contribute to cooperation between military and law enforcement personnel with respect to counternarcotics efforts, and (4) improve military justice procedures in accordance with internationally recognized human rights.

- (c) Increase awareness of internationally recognized human rights.
 - (2) Time/Amount: FY 2011 CAA appropriates \$105,573,000 available for the fiscal year.
 - (a) Of this amount, \$4,000,000 remains available until expended only through the regular notification procedures of the Committees on Appropriations.
 - (b) Reimbursement should be sought for provided IMET.
 - (3) Practitioner Notes: DSCA executed program on behalf of DoS. Guidelines can be found in the SAMM, chapter 10.⁶⁷
- f. Peacekeeping Operations (PKO) - 22 USC § 2348
- (1) Purpose: necessary expenses for PKO in furtherance of the national security interests of the United States, to include enhancing the capacity of foreign civilian security forces.
 - (2) Time: 1 year funds.
 - (3) Amount: 2014 CAA appropriated \$235,600,000.
 - (4) Practitioner's Notes: current focus for these programs is in Africa. Judge Advocates assigned to AFRICOM should be familiar with DoS PKO programs for which DoD provides military expertise and assistance. One such initiative is the Global Peace Operations Initiative (GPOI). No funds may be used in Africa to support any military training or operations that include child soldiers.

D. Governing Justly & Democratically

DoS and USAID finance a number of Governing Justly & Democratically programs, including: Rule of Law and Human Rights, Good Governance, Political Competition and Consensus Building, and Civil Society. Several of these

⁶⁷ The Defense Institute of Security Assistance Management operates the IMET for DSCA and maintains an online database of procedures and programs, *available at* <http://www.disam.dsca.mil/itm/>.

programs do involve DoD. The most prominent funding sources for these programs are the Economic Support Fund (ESF) and the Bureau of International Narcotics and Criminal Law Enforcement (INCLE), both of which provide DoS funds to Provincial Reconstruction Teams in Iraq and Afghanistan, and important element for development and the Rule of Law. Judge Advocates are often key participants in the Rule of Law mission while deployed and should be familiar with the interagency aspect of funding such missions.

1. Economic Support Fund (ESF), 22 USC §2346.

a. Purpose: to advance U.S. interests by helping countries meet short and long-term political, economic, and security needs. In other words, the primary function is to build the governance capacity of a foreign country.⁶⁸

b. Time: generally 2 year period of availability.

Amount: 2014 CAA: \$2,982,967,000 (avail. thru 30 Sep 2015)

c. Limitations:

- (1) Under §2346(e), these funds may NOT be used for military or paramilitary purposes.
- (2) These funds are sometimes earmarked for certain countries within the appropriations act. They are not exclusively for Iraq and Afghanistan.
- (3) The FY 2011 CAA prohibits use of ESF for direct government to government assistance in Afghanistan and Pakistan unless the Sec. of State certifies that the relevant implementing agency is (1) qualified to manage the funds, (2) written agreement is made as to clear and achievable goals, and (3) established mechanism to ensure intended use.
- (4) No ESF (or INCLE) may be used to assist the Government of Afghanistan until the Sec. of State, in consultation with the Administrator of USAID, certifies and reports to appropriations committees several key factors concerning corruption.

⁶⁸ USAID is the Agency primarily responsible for expenditure of these funds.

- (5) Funds should also be used to the maximum extent practicable to emphasize participation of women.
 - d. Practitioner Notes: ESF OCO funds are often used to fund PRT's and Rule of law activities.
- 2. International Narcotics and Criminal Law Enforcement (INCLE) Funds - 22 USC §2291.
 - a. Purpose: to “furnish assistance to any country or international organization . . . for the control of narcotic and psychotropic drugs and other controlled substances, or for *other anticrime purposes*.”⁶⁹
 - b. Time: generally 2 year period of availability.
 - Amount: FY 2014 CAA: \$1,005,610,000 available through 30 September 2015
 - c. Practitioner Notes:
 - (1) The DoS Bureau of International Narcotics and Criminal Law Enforcement (INL) has a broad mandate to “(1) to reduce the entry of illegal drugs into the United States; and (2) to minimize the impact of international crime on the United States and its citizens. Counternarcotics and anticrime programs also complement the war on terrorism, both directly and indirectly, by promoting modernization of and supporting operations by foreign criminal justice systems and law enforcement agencies charged with the counter-terrorism mission.”⁷⁰

E. Humanitarian Assistance.

- 1. DoS and USAID are the U.S. agencies designated as the lead to provide humanitarian assistance in response to emergencies and natural disasters overseas. Judge Advocates should be generally aware that DoS/USAID has authority and appropriations to fund humanitarian assistance from several different accounts. These accounts include, but aren't limited to:

⁶⁹ 22 U.S.C. § 2291 (4) (emphasis added).

⁷⁰ Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, *available at* <http://www.state.gov/p/inl/>.

Development Assistance Funds, the Economic Support Fund, and International Disaster Assistance Funds.

2. Although DoS/USAID have the primary responsibility and are appropriated funds to carry out humanitarian assistance, DoD possesses the logistics infrastructure and may be called upon to assist with transport and provision of supplies and aid. (see VI.D.).⁷¹
 - a. Iraq operations and presence in Iraq or Kuwait (as noted above) are met.

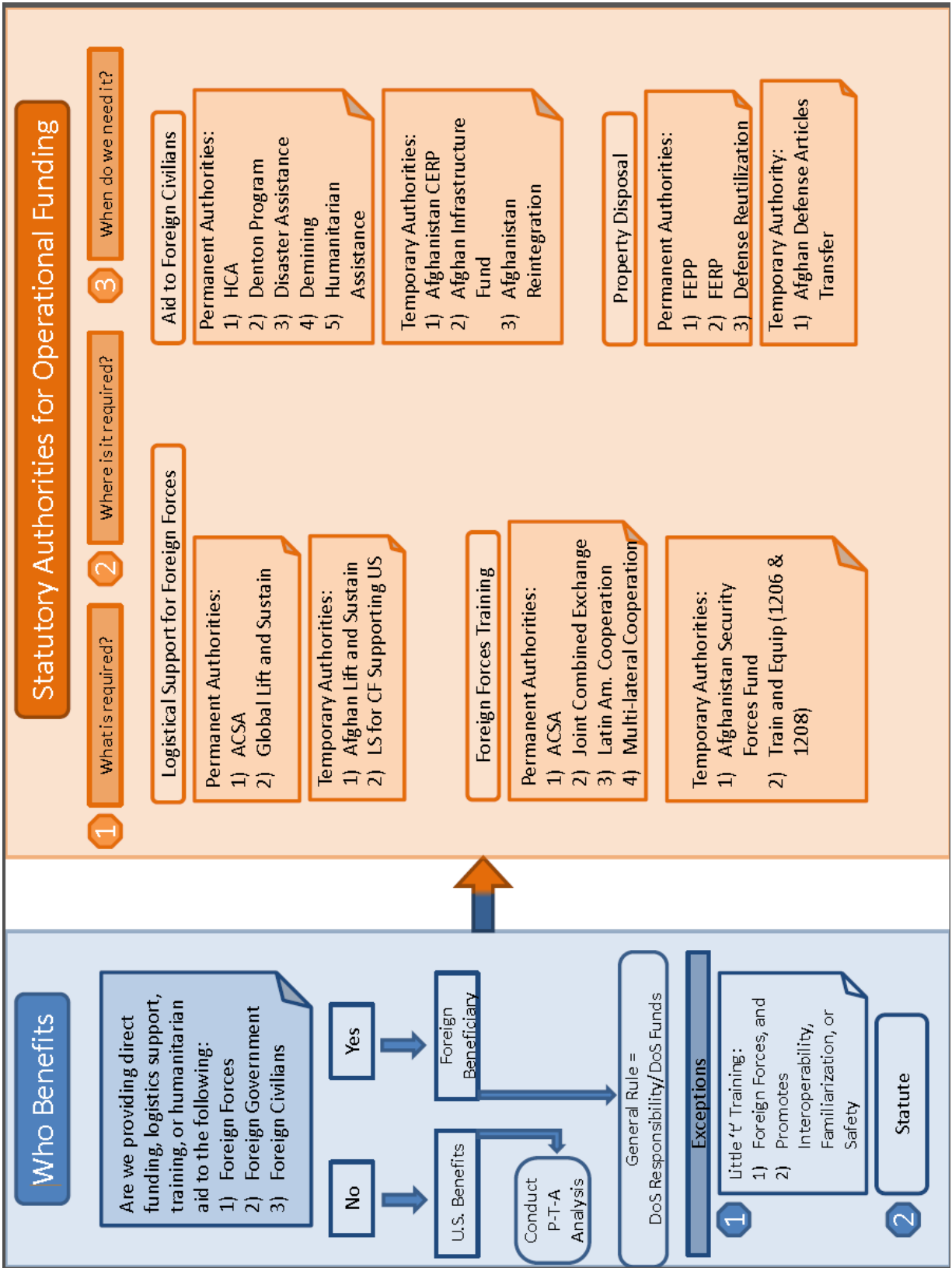
VIII. CONCLUSION.

- A. The Department of State, and not the Defense Department, is primarily responsible for all foreign assistance.
- B. Department of Defense funds foreign assistance, including security and humanitarian assistance, by statutory exception only.

Practitioners must find either permanent (usually Title 10) or temporary statutory authority for the Department of Defense to fund foreign assistance, unless a limited exception of “little t” training applies to the operation.

⁷¹ DoS exceptional requests to DoD for Humanitarian and Disaster Assistance are initiated and coordinated Office of International Security Operations (falling within the Under Secretary for Arms Control and International Security’s Bureau of Political-Military Affairs). See <http://www.state.gov/t/pm/iso/c21542.htm#dos-ihada> (last accessed June 22, 2010).

APPENDIX A: OPERATIONAL FUNDING ANALYSIS FLOW CHART



APPENDIX B: DOD FUNDING SOURCES

